

**U.S. Department of Labor**

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**Issue Date: 11 June 2003**

CASE NO.: 2001-LHC-01040

OWCP NO.: 01-146882

In the Matter of

**RICHARD A. GALLAGHER**

Claimant

v.

**ELECTRIC BOAT CORPORATION<sup>1</sup>**

Employer

and

**ACE AMERICAN INSURANCE CO.**

Carrier

and

**GALLAGHER INSULATION**

Employer

and

**ONE BEACON INSURANCE COMPANY,  
f/k/a CGU INSURANCE COMPANY**

Carrier

and

**DIRECTOR, OFFICE OF WORKERS'  
COMPENSATION PROGRAMS**

Party-in-Interest

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<sup>1</sup> As discussed *infra*, Electric Boat Corporation, ACE American Insurance Co., and One Beacon Insurance Company have been dismissed as parties to this case.

Appearances:

G. William Higbee, Esquire (McTeague, Higbee, Case, Cohen, Whitney & Toker), Topsham, Maine, for the Claimant

Lucas Strunk, Esquire (Pomeranz, Drayton, & Stabnick), Glastonbury, Connecticut, for Electric Boat Corporation and ACE American Insurance Company

Richard Van Antwerp, Esquire (Robinson, Kriger & McCallum) Portland, Maine, for One Beacon Insurance

Before: Daniel F. Sutton  
Administrative Law Judge

## **DECISION AND ORDER AWARDING BENEFITS**

### **I. Statement of the Case**

This proceeding arises from a claim for worker's compensation benefits filed by Richard A. Gallagher (the Claimant), against Electric Boat Corporation (Electric Boat), its insurer, ACE American Insurance Company (ACE), and against Gallagher Insulation (Gallagher Insulation), and its alleged insurer, One Beacon Insurance (One Beacon), under the Longshore and Harbor Workers' Compensation Act, as amended, 33 U.S.C. §901, *et seq.* (the Act).

After an informal conference before the District Director of the Department of Labor's Office of Workers' Compensation Programs (OWCP), the matter was referred to the Office of Administrative Law Judges (OALJ) for a formal hearing which was conducted before me in Portland, Maine on June 28, 2002, at which time all parties were afforded an opportunity to present evidence and oral argument. Appearances were made at the hearing by counsel on behalf of the Claimant, Electric Boat and ACE, and One Beacon. No appearance was made on behalf of Gallagher Insulation or the Director, Office of Workers' Compensation Programs (OWCP), neither of whom has participated in the proceeding before OALJ. The Claimant and one other witness, Norman Chaput, testified at the hearing, and documentary evidence was admitted as Claimant's Exhibits "CX" 1-8, One Beacon Exhibit "OBX" 1 and Electric Boat Exhibits "RX" 1, 4 & 8. Hearing Transcript "TR" 8-19.

At the hearing, One Beacon's unopposed motion to be dismissed as a potential responsible carrier was granted on the ground, supported by affidavit, that there is no evidence that it ever provided workers' compensation insurance coverage to Gallagher Insulation during the relevant time period covered by the claim. A motion on similar grounds by Electric Boat and ACE were taken under advisement, and the Claimant was granted leave of 30 days from the close of the

hearing in which to file any objection to the motion and to submit any written closing argument. The Claimant submitted his closing argument, conceding that the evidence of record established that Gallagher Insulation is the last covered employer for purposes of assessing liability under the Act and, therefore, that he had no objection to the dismissal of Electric Boat and ACE. By order issued on September 28, 1998, the motion was granted, dismissing Electric Boat and ACE as potentially responsible parties. The record is now closed.

After careful consideration of the record and the arguments advanced by the parties, I conclude that the Claimant is entitled to an award of permanent total disability compensation, interest on unpaid compensation, medical care and attorney's fees. My findings of fact and conclusions of law are set forth below.

## **II. The Claim and Issues Presented**

The Claimant alleges that he is totally disabled by lung disease caused by occupational exposure to asbestos, and he seeks an award of permanent total disability benefits from October 28, 1998 through the present and continuing based on the average weekly wage of \$506.76, medical care and attorney's fees. Administrative Law Judge Exhibit "ALJX" 5. The issues presented for adjudication are: (1) whether the claim against the remaining respondent, Gallagher Insulation comes within the coverage of the Act; (2) whether the Claimant suffered an injury that arose out of and in the course of his employment by Gallagher Insulation; (3) whether the Claimant is disabled and, if so, the nature and extent of any disability; and (4) whether Gallagher Insulation is the employer responsible for payment of any benefits awarded to the Claimant.

## **III. Summary of the Evidence**

### **A. The Claimant's Testimony**

The Claimant, Richard A. Gallagher, was born on November 8, 1938, making him 63 years old at the time of the hearing. He is married with four adult children, none of whom are any longer dependent upon him for support. The Claimant received a high school diploma and served in the U.S. Marines for the two years following graduation. TR 24-25

After his service with the Marines, he was employed by Electric Boat, which was then a division of the General Dynamics Corporation, from June 18, 1962 to June 29, 1964 as a pipe coverer/insulator. TR 25-26. The Claimant testified that his duties at Electric Boat involved insulating steam pipes, turbines, ducts and other machinery with asbestos-based products. He explained that these activities involved cutting the pipe covering before its application which caused asbestos fibers to be released into the air. TR 26. He stated that he also encased pipes with an asbestos-based cement product which consisted of asbestos powder that had to be mixed prior to application, creating dust in the work area. He stated that he also installed emercite, a fibrous asbestos blanket, around turbines located above his head and that asbestos fibers fell onto his face during the application. TR 27. In addition to installing insulation at Electric Boat, the

Claimant worked on tearing out reactors which were insulated with asbestos materials. TR 28. He testified that he did not wear a respirator or other breathing protection while working at Electric Boat. TR 26-27.

After he left Electric Boat in 1964, the Claimant was employed by Miller Insulation (Miller) until 1968, doing commercial insulation in hospitals and schools. CX 5 at 16-18; TR 29.<sup>2</sup> While employed by Miller, the Claimant worked for about a week at the Portsmouth, New Hampshire Naval Shipyard where he insulated the top of a boiler with asbestos insulation. The Claimant stated that, to the best of his knowledge, Miller is no longer in existence. CX 5 at 16-18.

In 1968, the Claimant formed and incorporated his own insulating business, Gallagher Insulation, and he worked for Gallagher Insulation as an employee between 1971 and 1978, and again from 1982 to 1985. CX 5 at 18; TR 29-30. He stated that he handled asbestos-based insulation during his employment at Gallagher Insulation until asbestos was replaced by fiberglass products in the mid-1970s. Gallagher Insulation primarily did insulation work in new construction of hospitals and schools, and the Claimant testified that his work occasionally involved renovations and tear outs of hospitals, schools, office buildings and paper mills. TR 31-32.

Although he was unsure of the exact time frame, the Claimant stated that during his employment with Gallagher Insulation, he worked for a short period of time at Bath Iron Works Corporation (BIW) in Bath, Maine as a subcontractor. CX 5 at 19-20. At BIW, he installed insulation on plumbing and heating lines within a new office building in the shipyard. TR 41. Subsequent to the subcontracting work at BIW, the Claimant did some work for Gallagher Insulation as a subcontractor at a Texaco Oil Company (Texaco) terminal facility in South Portland, Maine during the late 1960s and early 1970s. TR 42-43. The Claimant said that he repaired the insulation on steam pipes in the boiler room which was located in the terminal at the end of the pier where ships would dock. TR 32-33. He stated that he also did insulation repair work on the pipes which ran from the oil storage facility out to the pier where the ships would unload their oil while docked and that, to the best of his knowledge, the insulation used in the repairs was asbestos-based. TR 34. He did not wear breathing protection when he worked for Gallagher Insulation at the South Portland terminal. He worked at the South Portland terminal intermittently over a couple of years with each job assignment falling under a separate contract, and he estimated that all of his work for Gallagher Insulation at the South Portland terminal totaled approximately three to six months. TR 35.

The Claimant testified that Gallagher Insulation has been dissolved and has not been licensed to do business since 1994. TR 30. Although the Claimant testified that he recalled hiring an insurance agent to secure workers' compensation insurance, he was unable to provide the

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<sup>2</sup> Page citations to the hearing transcript and the transcript of the Claimant's pre-hearing deposition (CX 5) are to the actual transcript pages. All other citations to exhibits in the record contain references to the "Bates" stamp page numbers printed on the documents.

name or any other information relating to the identity of the insurance carrier. TR 30-31.

Following the dissolution of Gallagher Insulation, the Claimant relocated to Florida where he did commercial and industrial insulation work for two firms, Centin Corporation (Centin) and Goddard Mechanical Insulation (GMI). He testified that he was exposed to asbestos on an insulation removal job for Centin at a sugar plant. CX 5 at 35. The sugar plant was located near water, but the Claimant said that he did not work on any pipes on piers associated with the plant. CX 5 at 36. He also stated that he was exposed to asbestos while working for Centin on several power plant jobs. CX 5 at 36-37. He was not exposed to asbestos while working for GMI. CX 5 at 38.

The Claimant stopped working for GMI in the Fall of 1998 on his physician's recommendation after he was hospitalized and evidence of asbestos exposure was found in his lungs. CX 5 at 39-40. He testified that he experiences shortness of breath when exerting himself such as when he plays with his granddaughter, when he attempts to do any type of lifting, or when he attempts to engage in his hobby of hunting. TR 38-39. He has not looked for any work since 1998 because he has been employed as an insulation contractor for most of his life and has no other work experience. TR 37-38. He also testified that he lacks the skill or training for other jobs other than to "flip hamburgers" which he didn't think that he could do because he has arthritis in addition to breathing problems. CX 5 at 41-43. Instead, he applied for and was granted Social Security disability benefits. CX 5 at 54-55.

#### B. Testimony of Norman Chaput

Electric Boat called Norman A. Chaput, a retired Texaco employee who worked at the South Portland terminal. TR 60. Mr. Chaput testified that he was employed by Texaco at the South Portland terminal for 41 years until his retirement in 1997. TR 60-61. Mr. Chaput was originally hired as a night watchman and concluded his employment as the terminal manger. TR 61. He identified photographs introduced as RX 8 and testified that the photographs depict the South Portland Bridge and the Texaco dock where ocean going vessels dock and unload oil. TR 61-62. He remembered Gallagher Insulation doing repair work on steam pipes which would occasionally freeze during the winters and crack so that the insulation on the pipes would then have to be removed in order for the pipe to be repaired. TR 63. He stated that the heavy oil being unloaded from the ships could not be moved through the pipes unless it was heated by steam lines. TR 63. Mr. Chaput unsure whether the insulation on the pipes was asbestos, and he stated that he wouldn't know the difference between asbestos and fiberglass materials if he saw it. TR 64. However, he believed the pipes were installed in the early 1960's and, thus, were insulated with whatever insulating material was current at that period of time. TR 68.

Mr. Chaput testified that although Texaco owned the South Portland terminal, the company would lease out the space to other oil companies. TR 65. He explained that the Texaco employees' expertise was in the movement of the oil off the ships and that Texaco hired subcontractors to do all of the other maintenance and repair work at the terminal, including pipe insulation. TR 66. He stated that the subcontractors who did this maintenance and repair work at the terminal were never employees of Texaco. TR 67.

### C. Medical Evidence

Records from Lee A. Baggott, M.D. reflect that she saw the Claimant on October 26, 1998, at which time the Claimant complained of dyspnea on exertion for a year, dull pain in his left lateral, and some times right lateral, chest intermittently and sputum production when working with insulation material. CX 7 at 39. Dr. Baggott noted that the Claimant is a life-long nonsmoker and diagnosed asbestosis of both lungs seen radiographically with uncertain function sequelae. In addition, Dr. Baggott noted that the x-rays taken in July of 1998 showed pleural plaques with no parenchymal infiltrates or effusions. CX 7 at 40. Dr. Baggott recommended the completion of pulmonary function studies to determine the Claimant's true functional limitations. CX 7 at 40.

The Claimant submitted a consultative report from Paul J. LaPrad, M.D., a board-certified specialist in pulmonary and critical care medicine who examined the Claimant on December 1, 2000. CX 6. Dr. LaPrad also conducted pulmonary function studies on December 15, 2000 and reported that the testing revealed a severe diffusion impairment and a severe restrictive physiologic deficit as manifested by a decline in the forced vital capacity. *Id.* at 30. In a letter dated December 21, 2000, Dr. LaPrad stated that his diagnosis was asbestosis-related pleural disease documented by radiographs and occupational history. *Id.* at 34. He stated that the diagnosis of asbestosis remained in question because a high resolution CT scan of the Claimant's chest on May 12, 1999 did not reveal extensive interstitial infiltrates. *Id.* Although Dr. LaPrad reported that the Claimant's gas exchange was stable and his static lung volumes, as measured by helium dilution, was normal aside from an increase in the residual volume, he stated that the spirometry revealed severe restriction and that the Claimant's diffusion capacity was severely impaired as would be predicted in a patient with asbestosis. *Id.* Dr. LaPrad opined that the Claimant's current respiratory condition was "a direct consequence of asbestosis [sic] exposure during his employment at Electric Boat Shipyard as well as while working at power and paper plants along the East Coast." *Id.* at 35. Using the American Medical Association's Guides to the Evaluation of Permanent Impairment, Dr. LaPrad classified the Claimant's impairment as Class IV based upon a forced vital capacity at 26% of predicted, a FEV 1 at 35% of predicted and a DLCO at 48% of predicted. *Id.* Finally, he stated that the Claimant should be restricted from activities which cause disabling pain such as walking more than one quarter mile or carrying heavy objects. *Id.*

## IV. Findings of Fact and Conclusions of Law

### A. Coverage of the Act

In order his claim to come within the jurisdiction of the Act, the Claimant must establish that he was injured while engaged in maritime employment, that, is the loading, unloading, repairing, dismantling, or building of a vessel. 33 U.S.C. §§ 902(2), 902(3), 902(4); *Chesapeake and Ohio Railway v. Schwalb*, 493 U.S. 40, 45 (1989); *P.C. Pfeiffer Co. v. Ford*, 444 U.S. 69, 73-74 (1979). Generally, jurisdiction depends on an injured worker satisfying what are known as the “situs” and “status” tests. The situs test defines the geographic scope of the Act and is satisfied when the injury occurs “upon the navigable waters of the United States (including any adjoining pier, wharf, dry dock, terminal, building way, marine railway, or other adjoining area customarily used by an employer in loading, unloading, repairing, dismantling, or building a vessel).” 33 U.S.C. § 903(a); *Pfeiffer*, 444 U.S. at 73. The status test relates to the nature of the work and requires that the employee be “engaged in maritime employment, including any longshoreman or other person engaged in longshoring operations, and any harbor-worker including a ship repairman, shipbuilder, and ship-breaker,” excepting certain enumerated positions. 33 U.S.C. § 902(3); *Pfeiffer*, 444 U.S. at 73-74. After careful review of the record, I find that the Claimant satisfies both tests in regard to his employment with Gallagher Insulation.

The evidence establishes that the Claimant worked for Gallagher Insulation removing and repairing asbestos insulation on steam pipes which run from an oil storage facility at the Texaco South Portland terminal along a finger pier which extends into a navigable waterway to a dock where ocean-going vessels unload oil. It is well-established that an entire terminal facility, which adjoins navigable waters and which is customarily used for loading or unloading cargo, is a covered situs under section 903(a) of the Act. *Northeast Marine Terminal v. Caputo*, 432 U.S. 249, 281 (1977); *Prolerized New England Co. v. Benefits Review Board*, 637 F.2d 30, 38-39 (1st Cir. 1980), *cert. denied*, 452 U.S. 938 (1981); *Stockman v. John T. Clark & Son of Boston, Inc.*, 539 F.2d 264, 272 (1st Cir. 1976, *cert. denied*, 433 U.S. 908 (1977)). Since the record shows that the Claimant was exposed to asbestos while working for Gallagher Insulation at the Texaco South Portland terminal, which is clearly an adjoining terminal facility within the meaning of section 903(a), I find that he has established that his alleged injury occurred on a covered maritime situs.

With regard to the status requirement, the Supreme Court has held that the Act extends coverage to all workers on a maritime situs who are involved in the essential or integral elements of the loading or unloading process. *Schwalb*, 493 U.S. at 44, citing *Caputo*, 432 U.S. at 267-268, 6 BRBS 150 (1977). Furthermore, the Court has explicitly held that repair and maintenance work on equipment which is essential to the loading or unloading processes are covered under the Act. *Schwalb*, 493 U.S. at 47 (worker who repairs or maintains a piece of loading equipment is just as vital to and an integral part of the process as the operator of the equipment). In my view, the Claimant’s duties in this matter are closely analogous to the duties associated with the repair and maintenance of the loading equipment in *Schwalb*. Instead of a conveyor belt, the Claimant

worked on a pipeline that carries oil from tankers over a pier and onto Texaco's South Portland terminal and storage facility. Mr. Chaput credibly testified that the repair of the insulation on the steam pipes was essential to the offloading of the oil from the vessels in that the heat provided by the steam is necessary to keep oil flowing through the pipeline. Without heat, the unloading process could not take place. On these facts, I find that the Claimant's duties while employed by Gallagher Insulation in the maintenance and repair of steam pipes at the South Portland terminal were vital to and an integral part of the unloading process and that he consequently meets the maritime status requirement under the Act. *See Peter v. Hess Oil Virgin Islands Corp.*, 903 F.2d 935, 938 (3d Cir. 1990), *rehearing denied*, 910 F.2d 1179 (1990), *cert. denied*, 498 U.S. 1067 (1991) (maintenance employee who worked with hoses used to load fuel from oil refinery onto vessels had maritime status); *Kerby v. Southeastern Public Service Authority*, 31 BRBS 6, 8-10 (1997), *aff'd*, 135 F.3d 770 (4th Cir.1998) (Table) (workers who maintain and operate equipment at a power plant which provides electricity and steam for shipbuilding and ship repair operations have maritime status).

Having found that the Claimant satisfies both the maritime situs and status tests, I conclude that his claim against Gallagher Insulation comes within the jurisdictional coverage of the Act.

#### B. Injury Arising out of Employment

A worker seeking benefits under the Act must, as a threshold matter, establish that he suffered an "accidental injury . . . arising out of and in the course of employment." 33 U.S.C. 902(2); *Bath Iron Works v. Brown*, 194 F.3d 1, 4 (1st Cir. 1999) (*Brown*). The Claimant is aided in carrying his burden by section 20(a) of the Act which creates a presumption that a claim comes within its provisions. 33 U.S.C. §920(a). The section 20 presumption "applies as much to the nexus between an employee's malady and his employment activities as it does to any other aspect of a claim." *Swinton v. J. Frank Kelly, Inc.*, 554 F.2d 1075, 1082 (D.C. Cir. 1976) (*Swinton*), *cert. denied*, 429 U.S. 820 (1976). To invoke the presumption, there must be a *prima facie* claim for compensation, to which the statutory presumption refers; that is, a claim "must at least allege an injury that arose in the course of employment as well as out of employment." *U.S. Industries/Federal Sheet Metal, Inc., et al., v. Director, OWCP*, 455 U.S. 608, 615 (1982). A claimant presents a *prima facie* case by establishing (1) that he or she sustained physical harm or pain and (2) that an accident occurred in the course of employment, or conditions existed at work, which could have caused the harm or pain. *Brown*, 194 F.3d at 4, citing *Ramey v. Stevedoring Services of America*, 134 F.3d 954, 959 (9th Cir.1998) and *Susoeff v. San Francisco Stevedoring Co.*, 19 BRBS 149, 151 (1986).

There is no dispute in this case that the Claimant suffers from a lung condition. The Claimant credibly testified that he was exposed to asbestos during the course of his employment as an insulator for Gallagher Insulation, and he alleges that his lung disease, at least in part, was caused or contributed to by his exposure to asbestos during the course of his employment. No evidence has been provided to contradict the Claimant's testimony regarding his occupational



exposure to asbestos, and Dr. LaPrad's medical opinion causally connects the Claimant's lung disease to asbestos exposure. On these facts, I find that the Claimant has satisfied his *prima facie* burden of showing that he suffered a harm (lung disease) and that conditions existed at work (asbestos insulation materials) which could have caused the harm. Accordingly, I find that the Claimant has made a sufficient showing to invoke the section 20 presumption that his lung disease is causally related to his employment.

Once a claimant makes a *prima facie* showing of harm or pain and the existence of working conditions which could have caused or aggravated the harm or pain, the party opposing entitlement must produce substantial evidence severing the presumed connection between such harm and employment or working conditions. *Bath Iron Works Corp. v. Director, OWCP*, 109 F.3d 53, 56 (1st Cir. 1997); *Sprague v. Director, OWCP*, 688 F.2d 862, 865-66 (1st Cir. 1982). As discussed above, Gallagher Insulation has not participated in this proceeding, and it has submitted no evidence to rebut the presumption. Accordingly, I conclude that the Claimant has successfully established that he sustained an injury to his lungs which arose out of and in the course of his employment with Gallagher Insulation.

### C. Nature and Extent of Disability

Disability is generally addressed in terms of its nature, temporary or permanent, and its degree or extent, partial or total. *Stevens v. Director, OWCP*, 909 F.2d 1256, 1259 (9th Cir.1990), *cert. denied*, 498 U.S. 1073 (1991). The Claimant contends that he has been permanently and totally disabled since he stopped working on October 28, 1998. Claimant's Closing Argument at 4.

#### 1. Nature of Disability – Temporary or Permanent?

To be considered permanent, a disability need not be eternal or everlasting; it is sufficient that the "condition has continued for a lengthy period, and it appears to be of lasting or indefinite duration, as distinguished from one in which recovery merely awaits a normal healing period." *Air America, Inc. v. Director, OWCP*, 597 F.2d 773, 781 (1st Cir. 1979), citing *Watson v. Gulf Stevedoring Corp.*, 400 F.2d 649, 654 (5th Cir. 1968). *Stevens v. Lockheed Shipbuilding Co.*, 22 BRBS 155, 157 (1989). The traditional measure for determining whether a disability is temporary or permanent is whether the medical evidence establishes that the injured worker has reached maximum medical improvement. *Seidel v. General Dynamics Corp.*, 22 BRBS 403, 407 (1989). In a letter dated September 7, 2001, Dr. LaPrad stated that it was his opinion that the Claimant had reached a point of maximum medical improvement at the time of his evaluation in December 2000 and that he did not expect the Claimant's severe restrictive respiratory impairment due to asbestos-related pleural disease to improve in the future. CX 6 at 38. Based on Dr. LaPrad's uncontradicted opinion, and noting the absence of any evidence that the Claimant's condition appreciably improved between October 1998 and December 2000, I find that any disability suffered by the Claimant has been permanent in nature since October 28, 1998.

## 2. Extent of Disability – Total or Partial?

As in any case where a worker seeks disability compensation that is not provided for in the permanent partial disability compensation provisions set forth in section 8(c)(1) - (20) of the Act,<sup>3</sup> the Claimant has the initial burden of proving that he can not return to his usual employment which is defined as the regular duties that he was performing at the time of injury. *Elliott v. C & P Telephone Co.*, 16 BRBS 89, 91 (1984); *Ramirez v. Vessel Jeanne Lou, Inc.*, 14 BRBS 689, 693 (1982). The Claimant testified that he experiences pain and shortness of breath with any lifting, and Dr. LaPrad has restricted him from walking more than one quarter mile to avoid onset of disabling pain. While the record does not contain detailed information regarding the precise physical requirements of the Claimant's last job as an insulator for GMI, it is clear that his usual employment involved some regular physical exertion, and I find it reasonable to infer on this record that the severe restrictions imposed by Dr. LaPrad would be incompatible with the Claimant's usual employment as an insulator or, for that matter, any work more rigorous than sedentary. Based on this evidence, I find that the Claimant has met his *prima facie* burden of establishing that he cannot return to his usual employment.

Since the Claimant has established that he is unable to return to his usual employment because of his work-related lung disease, and since his physical limitations, age, work history in manual labor and lack of advanced education make it probable that he would be unable to secure alternate employment, the burden shifts to Gallagher Insulation to demonstrate the availability of suitable alternative employment or realistic job opportunities which the Claimant is capable of performing and which he could secure if he diligently tried. *Air America, Inc. v. Director, OWCP*, 597 F.2d 773, 779 (1st Cir. 1979). *See also Palombo v. Director, OWCP*, 937 F.2d 70, 73 (2nd Cir. 1991) (*Palombo*); *New Orleans (Gulfwide) Stevedores v. Turner*, 661 F.2d 1031 (5th Cir. 1981) (*Gulfwide Stevedores*); *Dixon v. John J. McMullen and Assoc.*, 19 BRBS 243, 245-46 (1986).

Gallagher Insulation had made no showing of suitable alternative employment. Accordingly, I conclude that the Claimant has successfully established that he has been totally and permanently disabled since he left his usual employment on October 28, 1998.

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<sup>3</sup> Sections 8(c)(1) - (20) establish minimum levels of compensation to which an injured worker employee is automatically entitled without any proof of actual loss of wage-earning capacity. *See Travelers Ins. Co. v. Cardillo*, 225 F.2d 137, 143 (2d Cir.1955), *cert. denied*, 350 U.S. 913 (1955).

## D. Gallagher Insulation's Liability and Effect of Default and Defunct Status

### 1. Liability

Once a claimant establishes that he or she is disabled due to a work-related injury, the next question to be addressed is the identity of the party liable for payment of any benefits. In cases involving occupational diseases, liability for the full amount of all benefits is imposed on the employer during the last employment in which the claimant was exposed to injurious stimuli prior to the date upon which the claimant became disabled. *Bath Iron Works v. Director, Office of Workers' Compensation Programs*, 244 F.3d 227, 228 (1st Cir. 2001), citing *Travelers Insurance Co. v. Cardillo*, 225 F.2d 137 (2d Cir.1955), *cert. denied*, 350 U.S. 913 (1955).<sup>4</sup> Accepting the Claimant's testimony that he was most recently exposed to asbestos insulation while working for Centin Corporation in a sugar mill and power plants in Florida, Gallagher Insulation was not the employer when the Claimant was last exposed to asbestos. However, the fact that Centin may have exposed the Claimant to asbestos during non-maritime employment subsequent to his covered work employment for Gallagher Insulation at the South Portland terminal does not relieve Gallagher Insulation of liability under the "last covered employer" rule, developed in *Todd Shipyards Corp. v. Black*, 717 F.2d. 1280, 1285 (9th Cir. 1983), *cert. denied* 466 U.S. 937 (1984) and followed by the Benefits Review Board in *Stilley v. Newport News Shipbuilding and Dry Dock Co.*, 33 BRBS 224, 225-26 (2000). In both of these cases, the "last employer" rule, which was first articulated in *Cardillo*, was applied to hold the claimant's last employer *covered under the Act* liable for the full amount of the award even though there was subsequent significant exposure to injurious stimuli in employment not covered by the Act. Although there is language in the First Circuit's opinion in *Bath Iron Works v. Brown*, 194 F.3d 1, 7 (1st Cir. 1999) ("[t]here is a difference between holding employers (and their insurers) liable for injuries that took place before an employee was hired and for those that took place after an employee left covered employment.") which could be construed as expressing some doubt as to the validity of the "last covered employer" extension of *Cardillo*, the Court has not specifically rejected the approach taken in *Black* and *Stilley* and I remain bound by Board precedent until modified or overruled.<sup>5</sup> Since there is no evidence that the Claimant was exposed to asbestos during any maritime employment covered by the Act, I find that Gallagher Insulation, as the last covered employer, is liable for the full amount of any benefits awarded under the Act.

### 2. Effect of Gallagher Insulation's Dissolution and Default

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<sup>4</sup> The First Circuit in which this matter arises, has adopted a modified version of the "last injurious exposure" rule, holding that the date of disability, rather than the date of awareness of disease, is the key to determining the responsible party. *See Liberty Mut. Ins. Co. v. Commercial Union Ins. Co.*, 978 F.2d 750, 756 (1st Cir.1992).

<sup>5</sup> It is unclear from the Court's decision in *Brown* whether the Court was actually expressing its own reservations about the "last covered employer" rule or merely summarizing arguments against the rule.

While a covered employer is generally responsible for on-the-job injuries sustained by its workforce, section 18(b) of the Act provides additional potential relief to claimants in employer-default situations: “In cases where judgment cannot be satisfied by reason of the employer’s insolvency or other circumstances precluding payment, the Secretary of Labor may, in his discretion and to the extent he shall determine advisable after consideration of current commitments payable from the special fund established in section 44 [33 USC § 944], make payment from such fund upon any award made under this Act and in addition, provide any necessary medical, surgical, and other treatment required by section 7 of the Act [33 USC § 907] in any case of disability where there has been a default in furnishing medical treatment by reason of the insolvency of the employer.” 33 U.S.C. § 918(b). *See also* 20 C.F.R. § 702.145(f). The Act provides that before petition can be made to the Fund, the claimant must first obtain a judgment in United States District Court based upon a supplemental order issued by the district director showing that the employer is in default on a compensation award entered by an administrative law judge. 33 U.S.C. § 918(a); *Meagher v. B.S. Costello, Inc.*, 20 BRBS 151, 154 (1987).

In view of the procedures set forth in section 18 of the Act, and in view of the broad discretion conferred upon the Secretary of Labor in deciding whether compensation shall be paid by the Special Fund in cases involving bankrupt, insolvent, or otherwise defaulting employers and carriers, an administrative law judge clearly lacks jurisdiction to order payment by the Fund. It is equally clear, however, that section 18 of the Act contemplates the entry of an award *pro forma*, when appropriate, in cases involving insolvent employers and disabled workers. *See generally In re Western States Drywall, Inc.*, 150 BR 774 (1993) (holding automatic stay, in context of bankruptcy petition, did not preclude entry of judgment in Department of Labor proceedings, but rather enforcement of judgment). Indeed, it is the award pursuant to the administrative proceeding followed by the employer’s default which triggers potential access to the fund. Under such circumstances, the award following a determination of entitlement is a procedural mechanism which begins the process by which the injured worker may petition the Secretary of Labor for relief from the special fund. *See, e.g., Hunt v. South Portland Shipyard*, Case No. 2000-LHC-2149 (ALJ) (2001); *Morey v. South Portland Shipyard*, Case No. 1997-LHC-790 (ALJ) (1998); *Howell v. Jacksonville Shipyard*, Case No. 1996-LHC-2217 (ALJ) (1997).

In this case, the Claimant asserts that Gallagher Insulation is defunct, and he has introduced a certificate from the Maine Secretary of the State showing that Gallagher Insulation’s status as a corporation was suspended as of January 6, 1994. CX 8. The record also contains representations from both Claimant’s counsel, G. William Higbee, and Electric Boat’s counsel, Lucas Strunk, attesting to their firms’ unsuccessful, yet diligent, efforts to obtain the name of Gallagher Insulation’s carrier during the relevant time period. Given this uncontradicted evidence that Gallagher Insulation is defunct and the absence of any responsible carrier, it appears that this case may be appropriate for relief from the Special Fund pursuant to section 18(b).

#### E. Amount of Benefits Due

Pursuant to section 8 of the Act, the amount of the Claimant’s disability compensation

must be determined with reference to his average weekly wage. 33 U.S.C. § 908. The average weekly wage is calculated as of the time of injury for which compensation is claimed. 33 U.S.C. § 910; *Merrill v. Todd Pacific Shipyards Corp.*, 25 BRBS 140, 149 (1991); *Hasting v. Earth-Satellite Corp.*, 8 BRBS 519, 524 (1978), *aff'd in pertinent part*, 628 F.2d 85 (D.C. Cir.1980), *cert. denied*, 449 U.S. 905 (1980). Prior to its dismissal from liability in this matter, Electric Boat stipulated to an applicable average weekly wage of \$506.76, and no contrary evidence has been introduced. TR 19.

Based on an average weekly wage of \$506.76 and my finding that the Claimant has been under a permanent total disability since October 28, 1998, I find that the Claimant is entitled under section 8(a) of the Act to compensation for permanent total disability, such compensation to commence on October 28, 1998 and continuing until further order, the two-thirds weekly compensation rate of \$337.84.

#### F. Interest

Although not specifically authorized in the Act, the Benefits Review Board and the Courts have consistently upheld interest awards on past due benefits to ensure that the employee receives the full amount of compensation due. *Strachan Shipping Co. v. Wedemeyer*, 452 F.2d 1225, 1228-30 (5th Cir.1971); *Quave v. Progress Marine*, 912 F.2d 798, 801 (5th Cir.1990), *rehearing denied* 921 F. 2d 273 (1990), *cert. denied*, 500 U.S. 916 (1991); *Watkins v. Newport News Shipbuilding & Dry Dock Co.*, 8 BRBS 556 (1978), *aff'd in pertinent part and rev'd on other grounds sub nom. Newport News v. Director, OWCP*, 594 F.2d 986 (4th Cir. 1979); *Santos v. General Dynamics Corp.*, 22 BRBS 226 (1989). Interest is due on all unpaid compensation. *Adams v. Newport News Shipbuilding & Dry Dock Co.*, 22 BRBS 78, 84 (1989). The Board has also concluded that inflationary trends in the economy have rendered a fixed interest percentage rate no longer appropriate to further the purpose of making claimant whole, and it has held that “the fixed six percent rate should be replaced by the rate employed by the United States District Courts under 28 U.S.C. §1961 (1982)” which is the rate periodically changed to reflect the yield on United States Treasury Bills. *Grant v. Portland Stevedoring Company*, 16 BRBS 267, 270 (1984), *modified on reconsideration*, 17 BRBS 20 (1985). Section 2(m) of Pub. L. 97-258 provided that the above provision would become effective October 1, 1982. My order incorporates by reference this statute and provides for its specific administrative application by the District Director. The appropriate rate shall be determined as of the filing date of this Decision and Order with the District Director.

#### G. Medical Care

An Employer found liable for the payment of compensation is additionally responsible pursuant to section 7(a) of the Act for those medical expenses reasonably and necessarily incurred as a result of a work-related injury. *Colburn v. General Dynamics Corp.*, 21 BRBS 219, 222 (1988). As there has been no evidence offered in defense of Gallagher Insulation’s liability for medical care, I find that Gallagher Insulation is liable pursuant to section 7(a) of the Act for those medical expenses that were reasonably and necessarily incurred as a result of the Claimant’s

work-related respiratory condition.

#### H. Attorney's Fees

Having successfully established his right to compensation, the Claimant is entitled to an award of attorneys' fees under section 28(a) of the Act. *Lebel v. Bath Iron Works*, 544 F.2d 1112, 1113 (1st Cir. 1976). The Claimant's attorney has filed an itemized application for attorney's fees and costs in the amount of \$9,821.65, and no objections have been raised on the requested fees and costs. Upon review, I find that the fee application complies with the requirements of 20 C.F.R. §702.132(a) and that the fees and costs requested are reasonably commensurate with the necessary work done, taking into account the quality of representation, the complexity of the legal issues involved and the amount of benefits awarded. This order on attorney's fees is enforceable provided counsel successfully applies to the Secretary and receives Special Fund relief which affords the Claimant the benefits hereinafter ordered. If the Secretary declines the Special Fund relief which the Claimant seeks, the approval of counsel's fee petition shall be void.

#### V. Order

Based upon the foregoing Findings of Fact and Conclusions of Law and upon the entire record, the following compensation order is entered:

1. The Employer, Gallagher Insulation, shall pay to the Claimant, Richard A. Gallagher, compensation benefits pursuant to 33 U.S.C. § 908(a) from October 28, 1998 through the present and continuing, at the weekly compensation rate of \$337.84;
2. The Employer shall pay to the Claimant interest on any past due compensation benefits at the Treasury Bill rate applicable under 28 U.S.C. §1961 (1982), computed from the date each payment was originally due until paid;
3. The Employer shall pay to the Claimant's attorney, G. William Higbee, Esquire, attorney's fees and costs in the amount of \$9,821.65; and
4. All computations of benefits and other calculations which may be provided for in this Order are subject to verification and adjustment by the District Director.

**SO ORDERED.**

**A**

**DANIEL F. SUTTON**  
Administrative Law Judge

Boston, Massachusetts  
DFS:cmm